should not be Hindu law but should be the *lex loci*, the law of the place where the marriage was contracted. The marriage took place in Malacca which was then a part of the Colony of the Straits Settlements. The law applicable was the law and custom established in the Straits Settlements during that time. The trial judge held that had the deceased not been previously married it would be correct to hold that this was a valid common law marriage as the law of England recognised only common law monogamous marriage. He referred to the case of *Isaac Penhas* v. *Tan Soo Eng*,[2] a Privy Council decision, where it was held that the common law of England was in force in Singapore in 1937 (and therefore in force in Malacca in 1943, Malacca being then a part of the Colony of the Straits Settlements).* In that case the question which the court had to decide was "was there a valid marriage according to the laws of the Colony as the marriage was celebrated between a Jew and a non-Christian Chinese in a modified Chinese form".

In the present case, as I have said earlier, the question is not whether there had been *justae nuptiae justum matrimonium* but whether there had been a marriage. At the time the marriage was celebrated between the deceased and the appellant, Hindu law and custom permitted polygamous marriages in India but then the question arose as to whether the consent of the first wife must be obtained before the second marriage could take place. According to *Gupta's* Hindu Law (2nd edition) page 900:—

"It has been held that a Hindu may marry again though he has a wife or wives living without his wife's consent and although no justification, such as the sterility of the wife, exists, unless custom prevents such marriage without such consent. In such a case her consent must be obtained and other conditions if any required must be fulfilled."

It was alleged by the respondent that no such consent was obtained. But assuming that consent was necessary it must be remembered that the second marriage took place during the Japanese occupation when communications within Malaya itself were difficult, let alone with the outside world and movements were very restricted. How then could the deceased contact his wife in India? But according to the respondent the deceased went back to India three times after the war and told them he had taken a woman in Malaya and there were two children by her. The respondent used to correspond with his Malayan sister and when he came to Malaya he stayed with the appellant at her house. In my view, having regard to the circumstances existing at that time and by the conduct of the wife and children in India, consent could be inferred. According to the appellant during all the time that she lived with the deceased and bore him children he held her out to both his Chinese and Chettiar friends as his wife. He took her to Chettiar functions as his wife — photographs Exhibits P.9, P.10 and P.11. The Chettiar community regarded her and her children as the deceased's wife and children. When he died she informed her husband's family in India and there was correspondence between the respondent and her daughter Meena. Her evidence was supported by her daughter Meena. It is not disputed that there was cohabitation between them as man and wife and continued till his death in her house. There was evidence that they attended Chettiars' functions together as husband and wife. There was a marriage according to Hindu customs, and although it was an imperfect marriage ceremony one should realize that it was performed during the most trying and difficult times of Japanese occupation when movements of an individual as well as a community were stringently restricted.

As was said by Lord Oaksey in *Isaac Penhas* v. *Tan Soo Eng, supra,* at page 76:—

"Abraham Penhas was dead and in such circumstances it would, in their Lordships' opinion, be altogether wrong to invalidate a marriage so solemnized followed as it was by years of cohabitation as man and wife and to bastardize the two children of the marriage, even if the other evidence were equivocal as to the status intended."

It was stated in *Carolis de Silva* v. *Tim Kim*:—[3]

"The law will presume a contract of marriage from evidence of cohabitation with the habit and repute of matrimony without any or with imperfecct formalities for its commencement."

Also it is quoted in *Gour's* Hindu Code (3rd edition) at page 299:—

"In case of conflict between persons belonging to different religions, the courts apply the rules of justice, equity and good conscience presumed the legality of a marriage if it was in fact performed."

It is therefore my view that it would be against these principles to regard the children of the deceased as illegitimate children. I would therefore allow the appeal with costs here and in the court below.

Azmi C.J. (Malaya) and **Raja Azlan Shah J.** concurred.

Appeal allowed.

Solicitors: *Laycock & Ong; V. K. Palasuntharam.*

* see p. 63 of the record.

JASWANT SINGH v. CENTRAL ELECTRICITY BOARD AND ANOR.

[O.C.J. (Gill J.) January 30, 1967]

[K.L. — Civil Suit No. 712 of 1963]

Tort — Negligence — Telephone wires resting on electric wires — Electrocution — Death of buffaloes — Whether buffaloes were trespassers — Buffaloes Enactment (F.M.S. Cap. 194) — Buffaloes not led by

nose strings — Whether duty of care owed to plaintiff — Remoteness of damage.

Electricity Regulations, 1951, reg. 16 ss. B(2) & C(4) — Breach of statutory duty.

Damages — Claim for buffaloes electrocuted — Whether duty of care owed by defendants to the plaintiff.

Animals — Death by electrocution — Buffaloes — Electrocution by accident — Duty of care.

The plaintiff sued the defendants for damages arising out of the death of five buffaloes and one dog belonging to him as a result of their being electrocuted by coming into contact with a telephone wire belonging to the second defendants (the Government of Malaysia). The wire had been snapped on the 30th November 1962 and was lying on the ground and resting on top of the aerial electricity lines belonging to the first defendants. It remained so resting till the day of the death of the buffaloes, December 3rd, 1962. The claim was based on the negligence of the servants of both defendants or alternately the negligence of the servants of one or other of the defendants. In the claim against the first defendants, the plaintiff also alleged breach of statutory duty under Regulation 16, section B(2) and/or section C(4) of the Electricty Regulations, 1951.

The defendants contended that they owed no duty of care to the plaintiff because the buffaloes were trespassers on the highway, that they were not being led by nose strings as required by section 2 of the Buffaloes Enactment (F.M.S. Cap. 194) and that they were not negligent.

Held: (1) they owed a duty of care to the plaintiff as in the eyes of the law he would be a neighbour irrespective of whether the buffaloes were or were not trespassers on the highway. Further, the buffaloes were not straying on the highway as they were being led by a person in charge and the fact that they were not being led by nose string would be relevant only in an action against the owner for any damage caused by the buffaloes;

(2) when electricity was carried overhead by wires or cables great care must be taken in addition to any precautions required by statute, to see that it was not likely to become a source of danger. The defendants were negligent in allowing the telephone wire to remain resting on the electric wires for such a long time;

(3) in the circumstances of the case the damage was not too remote for if the danger of the telephone wire becoming live with electricity was reasonably foreseeable, then death or serious injury to any person or animal coming in contact with it could also be reasonably foreseeable;

(4) on the facts of the case, the first defendants were not in breach of statutory duty as laid down in the Electricity Regulations, 1951. As the plaintiff was not relying on breach of statutory duty alone, both defendants were liable in damages.

Cases referred to:—

(1) *Donoghue* v. *Stevenson* [1932] A.C. 562, 618.

(2) *Stewart* v. *West African Terminals Ltd.* [1964] 2 Lloyd's Rep. 371, 375.

(3) *Fadon* v. *Harcourt-Rivington* (1932), 146 L.T. 391, 392.

(4) *Blyth* v. *Birmingham Waterworks Co.* (1856), 11 Exch. 781, 784.

(5) *Re Polemis and Furness, Withy & Co. Ltd.* [1921] 3 K.B. 560.

(6) *Overseas Tankship (U.K.), Ltd.* v. *Morts Docks & Engineering Co. Ltd., (The Wagon Mound)* [1961] A.C. 388.

(7) *Farrugia* v. *Great Western Railway Co.* [1947] 2 All E.R. 565, 567.

(8) *Alderman and Citizens of the City of Manchester* v. *Markland* [1936] A.C. 360.

CIVIL SUIT.

Dennis Murphy for the plaintiff.

V. L. Kandan for the 1st defendants.

L. T. Chan (Federal Counsel) for the second defendants.

Cur. Adv. Vult.

Gill J.: This is an action for damages arising out of the death of five buffaloes and a dog belonging to the plaintiff as a result of their being electrocuted by coming in contact with a telephone wire belonging to the second defendants, which had been lying on the ground and resting on top on aerial electricity lines belonging to the first defendants.

Although a mass of evidence was produced at the trial of the action, the facts of the case are simple and not greatly in dispute. On 3rd December, 1962 at about 12.30 p.m. the plaintiff's son named Kirpal Singh (P.W.3) was driving his father's herd of buffaloes home, after grazing them, along the left grass verge of Kapar Road in the direction of Klang in a single file, he being on the metal part of the road just beside the third buffalo in the file so as to keep them off the road. When he was at or near the 2nd milestone, Kapar Road, the three buffaloes in front suddenly dropped on the ground. He looked behind and saw that two more buffaloes had fallen down. His dog which was following behind the buffalces came running forward, but when it was some distance from the fallen buffaloes it yelped in pain, fell down and lay still. Four more buffaloes fell on the metal portion of the road, but they got up and moved to the middle of the road. The five buffaloes which fell on the grass did not get up again. He went near the fallen buffaloes and saw a thin dark wire underneath them.

Ishak bin Aminuddin (P.W.2) was sitting on the steps of his house at the 2nd mile, Kapar Road when the accident happened. His evidence is that his radio gave out noises of crackling and explosion. There was crackling and explosion on the overhead electric wires leading to his house. He also saw fire on the electric wires, and he heard the noise made by the buffaloes. There was a wire wrapped round the body of one of the buffaloes. The buffalo fell to the ground and so did some other buffaloes one by one. He saw a dog jumping and barking and then fall on a coil of wire and die.

His evidence as regards the telephone wire is that a rubber tree had fallen down during a storm at about 8 a.m. on 30th November, 1962, causing the telephone wires to snap, but he made no report about it to anybody. At about 6 p.m.

on the same day he noticed that the telephone wires had been repaired, although one wire was left resting over the electric wires leading to his house and dangling. The electric wires, however, were intact and had not snapped and fallen on the ground. The telephone wire which had been left dangling lay across the path to his house, and his wife or one of his children had to lift it up to let his car pass every time he went out of his house or came back.

This witness denied under cross-examination that the telephone wires had fallen down on 3rd December, 1962, although he conceded that it was difficult for him to say after a period of four years whether there was rain and storm on 3rd December, 1962. The only part of his evidence which has caused me some anxiety is his statement that the telephone wires had been repaired and that several wires had fallen down. However, as he had not actually seen any repairs being carried out, I had no reason to doubt his story that at least one telephone wire was left dangling over the electricity wire and resting on the ground for a period of three days. He is an independent witness and I accept his story that this telephone wire had to be lifted up whenever he took his car out and brought it back.

Mr. Liew G. Hoe (D.W.2), an electrical engineer employed by the first defendants, on being informed about the accident at about 12.30 p.m., proceeded immediately to the scene. He inspected the electrical installations and found them to be in order. The electricity service wires leading from a pole to the consumers across the road were intact, but there was a telephone wire resting on them and trailing in coils along the ground by the side of the ditch. He saw a few buffaloes and a dog lying dead on the left side of the road facing Klang. According to him, at least one buffalo had a telephone wire entwined at least on one of its legs. Subsequently he inspected the service wires after they had been removed and he noticed a half-inch cut on one of them. As regards this cut, he has expressed the opinion that a buffalo, in getting itself entangled with the telephone wire and in trying to free itself, dragged the telephone wire over the electricity service wire so as to cut through the insulation of the service wire and thus make the telephone wire live.

Mokhtar bin Taib (D.W.1), an electrical inspector, was informed about the accident at about 1.30 p.m. He too proceeded to the scene and carried out an examination of the electricity service wires on which the offending telephone wire had been resting. He has testified that the service wire was insulated, but he noticed a section of the wire on which certain pressure had been exerted causing a half-inch cut on the insulation and exposing the conductor slightly at at that point. The witness has expressed the view that when the telephone wire got entangled on the legs of the buffaloes a certain amount of rubbing and pressure being exerted on the insulation of the service wire caused the cut.

Paragraph 4 of the plaintiff's statement of claim states that the electrocution of the five buffaloes and the dog was caused by the negligence of servants or agents of the first-named defendants and by the negligence of the servants or agents of the second-named defendants or alternatively by the negligence of the servants or agents of one or other of the defendants. Particulars of negligence alleged against the defendants are set out in great detail, but the chief complaint is that they failed to take any, or any sufficiently prompt, steps to remove the electrical hazard resulting from the telecommunication line breaking and coming into contact with the electrical line. The claim against the first defendants is also based on breach of statutory duty under Regulation 16, section B(2) and/or section C(4) of the Electricity Regulations, 1951.

As negligence has been denied by both defendants, it is necessary to consider what it means. Lord Macmillan in *Donoghue* v. *Stevenson* [1] said:—

> "The law takes no cognisance of carelessness in the abstract. It concerns itself with carelessness only where there is a duty to take care and where failure in that duty has caused damage. In such circumstances carelessness assumes the legal quality of negligence and entails the consequences in law of negligence. . . . The cardinal principle of liability is that the party complained of should owe to the party complaining a duty to take care, and that the party complaining should be able to prove that he has suffered damage in consequence of a breach of that duty."

In other words, there is no liability for negligent conduct involving harm unless the law exacts in the circumstances of each particular case a duty to take care. *Winfield on Tort* (7th edition) at page 169 says:—

> "If the plaintiff is to succeed it must be established first that the circumstances in which his damage was caused were capable of giving rise to a duty of care, and, secondly, that the defendant actually owed him a duty on the particular facts of the case. The first of these requirements raises questions of law, and the duty may be termed the 'notional duty', while the second raises questions of mixed law and fact. It is the latter which sometimes shade off into questions of breach of duty or remoteness of damage."

The test for the existence of a duty to take care is the 'neighour' principle formulated by Lord Atkin in *Donoghue* v. *Stevenson* [1] as follows:—

> "There must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances. . . . The rule that you are to love your neighbour becomes in law you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law, is my neighbour? The answer seems to be — persons

who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."

Thus, the criterion is the foresight of the reasonable man, that is, was injury to the plaintiff the reasonably foreseeable consequence of the defendant's acts or omissions in all the circumstances of the case? If it was not, then the decision will be that no duty of care was owed by the defendant to the plaintiff. This does not mean, of course, that the plaintiff must be a person identifiable by the defendant. What is required is that he should be one of a class within the area of foreseeable injury. As regards what exactly must be foreseen, it is not necessary to show that the particular accident which has happened was foreseeable, any more than it is necessary to show that the particular damage was foreseeable; it is enough if it was reasonable in a general way to foresee the kind of thing that occurred (see *Stewart* v. *West African Terminals Limited* [2]).

No duty to take care can be said to exist where there is only a remote possibility of injury. To use the words of Lord Dunedin in *Fardon* v. *Harcourt-Rivington*,[3]

"If the possibility of the danger emerging is reasonably apparent, then to take no precautions is negligence; but, if the possibility of danger emerging is only a mere possibility which would never occur to the mind of a reasonable man, then there is no negligence in not having taken extraordinary precautions. . . . In other words, people must guard against reasonable probabilities, but they are not bound to guard against fantastic possibilities."

The test for deciding whether there has been a breach of duty is laid down in the oft-cited *dictum* of Alderson B., in *Blyth* v. *Birmingham Waterworks Co.*[4] "Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do." Thus, the standard of care required by the law is that of a hypothetically reasonable man and in applying this standard it is necessary to ask what, in the circumstances, the reasonable man would have foreseen. The likelihood of injury or damage being caused is a matter to be taken into account in determining what degree of care, if any, need be taken in any given circumstances when a duty to take care exists. If the chance of injury is small, little or no precautions need be taken against it, but if it is great, precautions should be taken to prevent or avoid it. The graver the consequences of a failure to take due care, the greater the degree of care which must be taken.

As regards damage in consequence of a breach of a duty to take care, the fundamental rule is that the injury suffered by the plaintiff must not be too remote a consequence of the defendants' conduct, or, as it is often said, the damage must not be too remote. In this connection, on the authority of the decision of the Court of Appeal in England in the case of *Re Polemis and Furness, Withy & Co., Ltd.*,[5] the rule was that if a reasonable man would have foreseen any damage to the plaintiff as likely to result from the defendant's act, then he was liable for all direct consequences of it suffered by the plaintiff whether a reasonable man would have foreseen them or not, that is, if they were directly traceable to the act and not due to the operation of independent intervening causes. That rule was abrogated by the Judicial Committee of the Privy Council in the case of *Overseas Tankship (U.K.), Ltd.* v. *Morts Dock & Engineering Co., Ltd.* (*The Wagon Mound*),[6] in which it was decided that "the essential factor in determining liability is whether the damage is of such a kind as the reasonable man should have foreseen," and that it is wrong to use one test (reasonable foreseeability) to determine culpability, i.e., duty and breach of duty, and a different test (directness) to determine remoteness of damage. In other words, the test of remoteness is to be treated as being identical with the test of negligence. The test of duty is foreseeability of some damage to the plaintiff. The test of damage is that the kind and the extent of plaintiff's damage should have been foreseeable in general outline.

In applying to the facts of the present case the principles of the law of negligence which I have discussed, the first question which I have to consider is whether in view of what happened the defendants can be said to have created a situation of peril, however blamelessly, which generated a consequential duty to adopt precautions before it culminated in injury. In other words, were the circumstances in which damage was caused to the plaintiff capable of giving rise to a notional duty of care? It is clear from the evidence that the telephone wire by itself was not a dangerous thing. What made it dangerous was the fact that it was resting on top of an electric wire by reason of which it was capable of becoming live with electricity, thereby causing damage to anyone who came in contact with it. It was the omission on the part of the defendants to remove the telephone wire from the top of the electric wire which created the situation of danger and consequently gave rise to a notional duty of care. The defendants have not sought to deny the existence of such notional duty. In any event, I do not think it can be seriously argued that no reasonable person could foresee some damage arising to someone in all the circumstances of the case.

The next question which I have to consider is whether the defendants owed any duty of care to the plaintiff. It has been contended on behalf of the defendants that they owed no duty of care to the plaintiff because the buffaloes were trespassers on the highway by reason of *Selangor*

Legal Notification No. 34 of 1961 under the Town Boards Enactment (F.M.S. Cap. 137) which prohibited the keeping of cattle within the Town Board area of Klang. Again, it is said that the buffaloes were not being led by nose strings as required by section 2 of the Buffaloes Enactment (F.M.S. Cap. 194). I cannot agree that either of these contentions is relevant to the issue. In the first place, the cattle were not straying on the highway. They were being led by a person in charge. In the second place, the fact that the buffaloes were not being led by the nose strings would be material only if I were dealing with an action against the owner for any damage caused by the buffaloes. In my opinion, the defendants owed a duty of care to the plaintiff, as in the eyes of the law he would be a neighbour. As was stated by Lord Green, M.R. in *Farrugia* v. *Great Western Railway Co.*,[7] the defendants, "having created between them a potential source of danger which would impinge on anybody on the highway in the neighbourhood, must be taken to have owed a duty towards anybody who might be on the highway in the near neighbourhood, whether he was there lawfully or whether he was there unlawfully."

Having found that the defendants were under a duty to take care *vis-a-vis* the plaintiff, I am now to consider whether they observed the standard of care required in the circumstances of the case. Here I think the answer is fairly simple. The question is whether the precautions required by the defendants was one which a reasonable and prudent man would think so obvious that it was folly to omit it. I do not think the defendants are attempting to deny that there was obvious need for some sort of precaution to be taken. The first defendants have produced evidence to show that they carried out regular inspections of their lines. The second defendants, on the other hand, say that they carried out no scheduled inspections and depended largely on reports from the public whenever something went wrong with their telephone wires. I do not think they can get over their responsibility by merely stating that they were not informed of the danger which had come into existence (see *Aldermen and Citizens of the City of Manchester* v. *Markland.*[8])

On the facts of the case I have made a finding that the telephone wire in fact snapped on the 30th of November, 1962. The accident took place three days later. When electricity is carried overhead by wires or cables great care must be taken, in addition to any precautions required by statute, to see that it is not likely to become a source of danger. In my opinion, the defendants were negligent in allowing the telephone wire to remain resting on electricity wires for such a long time. It was as much the duty of the first defendants as it was of the second defendants to see that the telephone wire was taken off the electricity wires. In all the circumstances of the case, both defendants failed to observe the standard of care required of them and were thus in breach of a duty to take care.

The last question which I have to consider is whether the damage suffered by the plaintiff was a reasonably foreseeable consequence of the defendants' negligence. For an answer in the affirmative to this question, all that is necessary is to show that the kind and the extent of the plaintiff's damage should have been foreseeable in general outline. Here again, I do not think that in all the circumstances of the present case it can be seriously argued that the damage suffered by the plaintiff was not the kind of damage which a reasonable man should have foreseen. If the danger of the telephone wire becoming live with electricity was reasonably foreseeable, then death or serious injury to any person or animal coming in contact with it would also be reasonably foreseeable. The damage suffered by the plaintiff was therefore not too remote a consequence of the defendants' negligence.

As I have stated above, I find on the facts of the case that the defendants owed a duty of care to the plaintiff, that they were in breach of that duty and that the damage suffered by the plaintiff was not too remote. The conclusion at which I must therefore arrive is that both defendants are liable in damages.

Before concluding the matter I must deal briefly with the allegations against the first defendants of breaches of statutory duty as laid down in the Electricity Regulations, 1951. It is clear from the evidence that they complied with Regulation 16, section B, sub-section 2(a)(iv) and that the whole of section C under Regulation 16 did not apply in this case because the electricity wire on which the telephone wire had fallen was a low voltage service wire. There was, therefore, no breach of statutory duty, so that if the plaintiff was relying on breach of statutory duty alone as the basis of his claim against the first defendants, he would not succeed.

The plaintiff is claiming a sum of $3,200 as being the value of the buffaloes which he lost. In the report which the plaintiff's son made in the presence of his father the value was stated to be $2,150. I am satisfied on the evidence before me, notwithstanding the plaintiff's denial, that it was the plaintiff who informed his son as to what in his opinion his buffaloes were worth. The plaintiff incurred a sum of $60 to have the buffaloes removed and buried as directed by the police. He is clearly entitled to recover that sum from the defendants. There will therefore be judgment for the plaintiff against both defendants for $2,210 and costs.

Solicitors: *Murphy & Dunbar; Shearn, Delamore & Co.*